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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 564

MILWAUKEE TOWNE CORPORATION,
Petitioner,

vs.

LOEW'S INCORPORATED, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Your petitioner, Milwaukee Towne Corporation, a corporation, respectfully prays that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review it opinion and judgment affirming a judgment of the District Court which in the face of a Federal Statute allowing interest denied interest on a judgment for money damages and costs which had been affirmed by the Court of Appeals, 190 F. 2d 561, because the mandate of the Court of Appeals was silent as to interest.

STATEMENT.

The original action was an antitrust suit brought by your petitioner as plaintiff. The District Court found the issues in plaintiff's favor, and entered Findings of Fact and Conclusions of Law (R. 3-26) that plaintiff had been wrongfully damaged during two separate periods (R. 20-21): During the first period, May 2, 1946 to August 15, 1946, in the sum of $118,101.32 (R. 20), and during the second period, December 26, 1946 to July 20, 1948, in the sum of $313,858.10 (R. 21). On February 9, 1950 the court entered judgment on its Findings and Conclusions for threefold the combined total, $1,295,878.26, plus costs and attorney's fees to be fixed by further order (R. 27).

On April 14, 1950, the court entered an order taxing plaintiff's costs at $4,871.63 and fixing plaintiff's reasonable attorney's fee at $225,000 (R. 28).

The Court of Appeals reversed the damage finding for the first period, $118,101.32, but affirmed the finding for the second period, $313,858.10, stating in its opinion, "In our view, the fact of damage was shown as to the second damage period, but not as to the first." 190 F. 2d 561, 566. The court then directed entry by the District Court of a new judgment for $941,574.30, being three times the $313,858.10 damages for the second period (R. 29). As to plaintiff's reasonable attorney's fee the Court of Appeals modified the finding and judgment for $225,000, holding that plaintiff was entitled "to an allowance of not more than $75,000," thus in effect affirming the District Court's finding to that extent. The judgment for costs, $4,871.63, had not been appealed from, and remained in full force and effect.

Plaintiff moved the District Court to include interest at the statutory rate of 5% on the judgments as and to the extent affirmed, from the dates of their original entry, and likewise to include interest on the judgment for costs. The District Court refused so to allow interest, and the Court of Appeals affirmed, on the assumed authority of the decision of this Court in *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304.

OPINIONS BELOW.

The District Court rendered no opinion. Its judgment and decree (R. 64-65) is unreported. The opinion of the Court of Appeals appears at pages 94-99 of the record and is as yet unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 14, 1952 (R. 100). The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. A., § 1254 (1).

STATUTES INVOLVED.

The statutes involved are 28 U. S. C. A., § 1961 (62 Stat. 957), which provides—

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

Smith-Hurd Ill. Ann. St. Ch. 74, Sec. 3 which provides—

> "Judgments recovered before any court or magistrate shall draw interest at the rate of five (5) per

centum per annum from the date of the same until satisfied. When judgment is entered upon any award, report or verdict, interest shall be computed at the rate aforesaid, from the time when made or rendered to the time of rendering judgment upon the same, and made a part of the judgment."

QUESTION PRESENTED.

May the right to interest on affirmed money judgments, where that right is prescribed by both Federal and State statutes, be defeated and nullified by the failure of the reviewing court expressly to provide for the payment of interest in its mandate?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

(1) It is of vital importance in the due administration of justice in the Federal courts that the mandatory and non-discretionary grant of statutory interest on money judgments as provided for by positive Federal statute be recognized and enforced.

(2) There is conflict of decision between certain of the Courts of Appeals as to the proper construction of a mandate silent as to interest where the right to interest is given by statute. *Metcalf* v. *City of Watertown* (C. C. A. 7th), 68 F. 862, 863-4, *Huntley* v. *Southern Oregon Sales, Inc.* (C. C. A. 9th), 104 F. 2d 153, 155, *Blair* v. *Durham* (C. C. A. 6th), 139 F. 2d 260, 261, *Louisiana & Arkansas R. Co.* v. *Pratt* (C. C. A. 5th), 142 F. 2d 847, 848-9, *Anglin & Stevenson* v. *United States* (C. C. A. 10th), 160 F. 2d 670, 672, *Briggs* v. *Pennsylvania R. Co.* (C. C. A. 2d), 164 F. 2d 21, affirmed 334 U. S. 304.

(3) The District Court and Court of Appeals below

have refused to follow the applicable decision of this Court, namely the case of *Kneeland* v. *American Loan & Trust Co.*, 138 U. S. 509, holding that separable parts of a judgment affirmed in the Court of Appeals carry interest by operation of law under the Federal statute from the date of the entry of the original judgment.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

MILWAUKEE TOWNE CORPORATION,
By THOMAS C. MCCONNELL,
HUBERT VAN HOOK,
Attorneys for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for a writ of certiorari.

JURISDICTION.

The jurisdiction of this Court is shown in the accompanying petition.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 94-99 of the record and is as yet unreported.

SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioner intends to urge that the Court of Appeals for the Seventh Circuit erred—

(1) In holding that the decision in *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 required it to affirm a judgment of the District Court denying interest on the portions of findings and judgments for money damages, costs and attorney's fees which had been affirmed by the Court of Appeals.

(2) In failing to hold that petitioner, the plaintiff below, was entitled as of right to have mandatory and non-discretionary statutory interest computed and paid on its money judgments, to the extent affirmed, from the dates of their original entry until the date of payment.

ARGUMENT.

I.

The Original Findings and Judgment for Money Damages for the Second Damage Period Entered by the District Court Were Affirmed by the Court of Appeals.

This petition involves the affirmance of a judgment entered pursuant to mandate following the decision in *Milwaukee Towne Corporation* v. *Loew's Inc., et al.*, 190 F. 2d 561, and the only question at issue results from the refusal of the District Court to direct in its judgment the computation and payment of interest on its original money judgments, to the extent affirmed by the decision just cited, from the dates of their entry until the date of payment.

The original action was for treble damages under the antitrust laws. Two damage periods were involved. For the first period the damages as found were $118,101.32, and for the second, $313,858.10 (R. 20-21), and on February 9, 1950 the court entered judgment in plaintiff's favor for threefold the combined total of these amounts, or $1,295,878.26, plus costs and plaintiff's attorney's fees (R. 27).

On April 14, 1950 the court entered an order assessing plaintiff's taxable costs at $4,871.63 to be included as the costs in the judgment of February 9, 1950 (R. 28).

The defendants appealed from the judgments for $1,295,878.26 and attorney's fees, but no question was raised as to the judgment for costs.

The Court of Appeals concluded that there was no support for the findings upon which $118,101.32 damages for the first period were predicated, "but that the findings as

to the second damage period were properly supported" (190 F. 2d 566). The damages for the second period amounted to $313,858.10 which when trebled pursuant to the provisions of the antitrust laws amounted to $941,574.30.

The court concluded its opinion by directing the issuance of a mandate in the following terms (190 F. 2d 573) which was issued accordingly (R. 29):

> "(1) That the treble damage judgment entered by the said District Court on February 9, 1950 be reversed and that the cause be remanded to the said District Court with directions that it be vacated and in its stead a judgment be entered in favor of the plaintiff in the sum of $941,574.30.
>
> "(2) That the judgment for a reasonable attorney's fee entered by the said District Court on April 14, 1950 be reversed and that the cause be remanded to the said District Court with directions that in its stead a judgment be entered in favor of the plaintiff in the amount of $75,000.00."

It will be noted that this mandate provided for threefold, $941,574.30, the $313,858.10 damages for the second period and for reduction of the attorney's fee to $75,000. The $4,871.63 costs adjudged to petitioner below of course remained unaffected.

Petitioner's position is that, irrespective of the form of language used by the Court of Appeals' mandate, the original judgment, to the extent that it was based on the separate finding of damages for the second period, was affirmed *in toto*.

In support of its position, petitioner in the court below cited the case of *Kneeland* v. *American Loan & Trust Co.*, 138 U. S. 509 in which this Court said:

> "We think the ruling of the circuit court was correct. The amount of the allowances for these five

> months was separately stated, and such allo
> were sustained by this court. While the forn
> crees were in terms reversed, and the cases rer
> for the entering of new decrees, yet the terms c
> new decrees were specifically stated, and in so
> the separate and distinct matters embraced
> former decrees were ordered to be incorporat
> the new, it is to be regarded as *pro tanto* an affi
> * * * The rights of the parties are not to be sa
> to the mere letter, and whether the language u
> 'reversed', 'modified' or 'affirmed in part and r
> in part', is immaterial."

The Court of Appeals refused to follow that case eously holding in effect that it was precluded fron so by the decision of this Court in *Briggs* v. *Penns R. Co.*, 334 U. S. 304.

Under the decision of this Court in the *Kneela* the judgment for $941,574.30 damages and $4,871.(were affirmed and under the applicable Federal stat ried interest from February 9, 1950 by operation irrespective of the silence of the Court of Appeals' r as to interest.

II.

The Federal and Illinois Interest Acts Operated b Own Force Upon the Affirmed Judgment From a the Entry Thereof Until Paid, and the Distric Should Have Directed Payment Accordingly.

The Federal Interest Act, 28 U. S. C. A. § 1961, 957, derives from R. S. § 966 and the Act of Au 1842, 5 Stat. 518, and for the purposes of cases district courts sitting in Illinois incorporates by r the Illinois Interest Act, Smith-Hurd Ann. Stat. Cl 3. These Acts operate by their own force upo judgments entered in such cases. *Amis* v. *Smith*

303, 311, *United States* v. *Verdier,* 164 U. S. 213, *Blakeslee's Storage Warehouses* v. *City of Chicago,* 369 Ill. 480.

Since the Federal interest statute expressly provides for the allowance of interest at the rate allowed by the State statute, the mandate of the Court of Appeals on the first appeal herein of necessity included interest by operation of those statutes. Certainly a mandate which expressly excluded interest would have been clearly erroneous, since the court was without any discretion or power to exclude it. And until the decision of the present case the Court of Appeals for the Seventh Circuit has been of the opinion that a mandatory interest statute must be read into the mandate of a reviewing court. *Metcalf* v. *City of Watertown,* 68 F. 859.

Other courts of appeals have entertained the same views. *Huntley* v. *Southern Oregon Sales Inc.* (C. C. A. 9th), 104 F. 2d 153, 155, *Blair* v. *Durham* (C. C. A. 6th), 139 F. 2d 260, 261, *Louisiana & Arkansas Ry. Co.* v. *Pratt* (C. C. A. 5th), 142 F. 2d 847, 848-9, *Anglin & Stevenson* v. *United States* (C. C. A. 10th), 160 F. 2d 670, 672.

This Court has held that the provisions of an Act of Congress cannot be destroyed by a rule of court. A clear statement of the principle appears in *Washington-Southern Nav. Co.* v. *Baltimore & P. S. B. Co.,* 263 U. S. 629, 635:

> "Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. *Nor can a rule abrogate or modify the substantive law.* This is true, whether the court to which the rules apply be one of law, of equity or of admiralty." (Italics ours.)

This statement is supported by citations which go back to the year 1826, and is followed in numerous later cases, for example, *United States* v. *Sherwood,* 312 U. S. 584, 589-90.

A fortiori an Act of Congress cannot be nullified by the silence of a Court of Appeals' mandate.

In the recent case of *Phillips Petroleum Co.* v. *Oldland* (C. A. 10th), 187 F. 2d 780, 782, cert. den. 342 U. S. 816, the court had no difficulty in recognizing the right to interest where that right had not been in issue in the prior proceedings, notwithstanding "a long and unrelenting line of authorities, of which *Briggs* v. *Pennsylvania Railroad Co.* * * * is the latest, * * *" because "we think that the rule announced and adhered to there must be considered in the light of what has been said elsewhere with respect to the scope and controlling effect of an appellate court's mandate." In the instant case the allowance of costs was not even appealed from and the Court of Appeals' mandate had no possible application to it.

Petitioner maintained in the Court of Appeals, and urges here, that *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 is not controlling on the point at issue in the instant case. In that case there had been no judgment, and at the time when a correct judgment should have been entered the plaintiff "was 'entitled' only to have the trial judge decide the pending motions and direct the entry of such judgment as he fairly determined to be lawful and just", 164 F. 2d 21, 23. In the case at bar, on the other hand, there was an actual judgment which from the time of its entry drew statutory interest until paid because it was affirmed. Thus the Court of Appeals mistakenly concluded that it was bound by the decision of this Court in the *Briggs* case to depart from what had been settled law in the Seventh Circuit for many years.

Conclusion.

It is, therefore, respectfully urged that this Court's supervisory powers should be exercised and that this petition for a writ of certiorari should be granted in order that the *Briggs* case shall not be given an application in conflict with and in nullification of an applicable Act of Congress. A question of large importance in the administration of justice in the Federal courts and the power of a court of appeals to nullify an applicable Federal statute is thus presented.

Respectfully submitted,

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HUBERT VAN HOOK,
Attorneys for Petitioner.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Court will observe that the question discussed in the Court of Appeals' opinion (R. 94) is not the same as the question presented by the Petition. That is because the petitioner has changed its position.

In the Court of Appeals the petitioner urged strongly that its interest claim was predicated on the Rules of Decision Act, 28 U.S.C. §1652, 62 Stat. 944, which was said to make applicable in this case an Illinois statute providing that a judgment based upon an "award, report or verdict" should include interest to the date of judgment upon the same. The petitioner urged that either the findings in this case or the original judgment, later reversed and vacated, should be treated as an "award, report or verdict" under the State law.

The claim thus advanced under the Rules of Decision Act was the question which the Court of Appeals decided

adversely to the petitioner. The petitioner does not now deny that it was decided correctly. Instead, the petitioner now relies upon another Federal Statute, 28 U.S.C. § 1961, providing for interest on District Court judgments, from the date of entry thereof, at the rate provided by State law. For this purpose the original judgment, although reversed and vacated, is treated by petitioner as still capable of bearing interest to the extent that the new judgment was based upon the same findings.

While it cannot be said that the petitioner failed entirely to mention its present theory in the Court of Appeals, it is true that it was not mentioned there in the "Statement of Points on Which Appellant Intends to Rely" (R. 85), or in petitioner's opening brief, and only was alluded to on one page of its reply brief as a possible alternative theory.* After the decision of the Court of Appeals no petition for rehearing was filed to suggest that any important point relied upon by petitioner had been overlooked by that Court.

The result is that the petitioner now finds no fault with anything actually considered and decided below, but places its entire reliance upon a theory barely mentioned in the Court of Appeals. Respondents suggest, respectfully, that this would be an appropriate case for the application of this Court's repeated holdings that it will not consider on certiorari questions first urged in this Court. *McCullough* v. *Kammener Corp.*, 323 U. S. 327, 328 (1945); *Zellerbach Co.* v. *Helvering*, 293 U. S. 172, 182 (1934); *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380 (1935); *United States* v. *Classic*, 313 U. S. 299, 329 (1941); *Minnich* v. *Gardner*, 292 U. S. 48, 53 (1934).

* Certified copies of petitioner's briefs in the Court of Appeals have been deposited with the Clerk of this Court.

Petitioner invokes the power of this Court to grant a writ of certiorari upon the following grounds:

1. That notwithstanding the specific terms of the Court of Appeals mandate, which stated the exact amount of the new judgment to be entered and was silent as to interest, and which petitioner never sought to have amended, the District Court should have allowed interest on the new judgment, from the date of the old, by virtue of Section 1961, 28 U.S.C., which petitioner contends makes mandatory the grant of interest on money judgments affirmed by a Court of Appeals.
2. That the District Court and the Court of Appeals refused to follow an applicable decision of this Court, namely, the case of *Kneeland* v. *American Loan and Trust Co.*, 138 U. S. 509 (1891).
3. That there is a conflict of decision between certain of the Courts of Appeals regarding the proper construction of a mandate silent as to interest.

None of these grounds invoked by the petitioner has any validity whatsoever because:

1. Sec. 1912 and not Sec. 1961 controls where a judgment is affirmed on appeal, and the allowance of interest is therefore within the sole discretion of the reviewing court.
2. The case of *Kneeland* v. *American Loan and Trust Co.*, 138 U. S. 509 (1891) is not applicable. In that case this Court, being uncertain of the amount due under the affirmed portion of a decree, had left to the trial court the computation of the amount, and approved the inclusion in such computation of interest as damages for delay. At the same term, however, this Court in another case, *In re Washing-*

ton & Georgetown R. Co., 140 U. S. 91 (1891), where nothing was left to the trial court by the mandate except to enter judgment as directed, held that this Court's failure to allow interest by its mandate was a denial thereof. The latter case is the applicable precedent here.

3. The decision of this Court in *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948), terminated and resolved any conflict between the circuits respecting the construction of a mandate silent as to interest. Moreover, under the decision of this Court in the *Briggs* case, petitioner, having failed to ask the Court of Appeals to amend its mandate, now is barred from urging that interest should have been allowed under Sec. 1961.

And for these reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

I.

Sec. 1961 has no application where a judgment is affirmed on appeal because in that event the question of interest is entrusted by Sec. 1912 to the discretion of the reviewing court.

Basic to petitioner's entire argument is its contention that Sec. 1961, 28 U.S.C., is a mandatory grant of interest on all money judgments affirmed by the Courts of Appeals. This contention conflicts with repeated holdings of this Court.

There are two Federal statutes, both contained in Title 28, which deal with interest on judgments recovered in the Federal courts—Section 1961 and Section 1912. Section 1912 grants this Court and the Courts of Appeals a discretionary power to allow the appellee "just damages for his delay" where a judgment is affirmed. Section 1961 pro-

vides that district court judgments shall bear interest at the State rate, and that such interest may be levied upon execution.

Both of these sections are merely reenactments of much older statutes. See H. Rep. No. 308, pp. A 160 and A 166, 80th Cong., 1st Sess. 1947. Section 1912 was first enacted in 1789; Section 1961 in 1842. 1 Stat. 85; 5 Stat. 518.

This Court was early faced with the problem whether both of these sections, or *only* Section 1912, applied in the event that a judgment was affirmed on appeal. The Court held that the present Section 1912 governs exclusively, and that what is now Section 1961 has no application. *Mitchell* v. *Harmony,* 13 How. 115, 147-150 (1852); *Perkins* v. *Fourniquet,* 14 How. 328 (1853). See also *Washington & Georgetown R. Co.* v. *Harmon's Administrator,* 147 U. S. 571, 589 (1893); *West Wisconsin Ry.* v. *Foley,* 94 U. S. 100, 101-102 (1876), in which the Court reaffirmed the holding of the *Mitchell* and *Perkins* cases.

For a century the Rules of this Court have provided that the appellee may recover, in the event of an affirmance, interest at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered. And many of the Courts of Appeals have similar rules. But it has long been established that such conformity to State law is a matter of grace and is not required by any statute, and that the ultimate source of the interest is not State law but the discretionary power of the reviewing court under Section 1912. *Perkins* v. *Fourniquet,* 14 How. 328 (1853); *Washington & Georgetown R. Co.* v. *Harmon's Administrator,* 147 U. S. 571, 589 (1893); *Hagerman* v. *Moran,* 75 F. 97 (9th Cir. 1896).

The Court of Appeals therefore did not violate a statute when it refused to allow petitioner interest for the

period that the case was pending before it; such a refusal was within its discretionary authority under Section 1912.

The decisions of this Court relied upon by petitioner are not in point. In neither *Amis* v. *Smith,* 16 Pet. 303, 311 (U. S. 1842), nor *United States* v. *Verdier,* 164 U. S. 213, 215 (1896), had the judgment upon which it was sought to collect interest been appealed. As a result, Section 1912, which confides interest to the discretion of the reviewing court, was inapplicable.

II.

The decision of the Court of Appeals does not conflict with the decision of this Court in Kneeland v. American Loan and Trust Company, and any other decision by the Court of Appeals would have been in conflict with the decisions of this Court.

In *Kneeland* v. *American Loan and Trust Company,* 138 U. S. 509 (1891), the Court held (1) that where a divisible portion of the findings underlying a decree is left untouched by the reviewing court, the decree is to that extent affirmed, even though in form reversed and remanded; and (2) that where a mandate "left the matter of computation to the trial court" because of uncertainty as to the amount due, the latter properly might include in its calculation interest as damages under then Rule 23 of this Court.

The first of these holdings does not help petitioner. It merely emphasizes the fact that, if this be treated as a case of partial affirmance rather than complete reversal, the governing interest statute is Section 1912, not Section 1961.

The second holding is inapplicable where, as in the instant case, the reviewing court's mandate is definite as to

the judgment to be entered and is silent as to
Such a case, *In re Washington & Georgetown R.*
U. S. 91 (1891) was decided at the same term
Kneeland case, and it was there held that the s
the mandate as to interest was a denial thereof.

Thus, it is clear that this Court did not intend
to overrule by the *Kneeland* case its earlier de
Boyce's Executors v. *Grundy,* 9 Pet. 275 (U. S
where it was held that the issuance of a mandate
a money decree with costs, nothing being said a
allowance of damages or interest, was equivalent
of damages or interest under the discretion vest
Court by Section 1912. The explicit form of the
in this case, which not only failed to mention in
damages, but directed the vacation of the old
and stated the exact amount for which a new
was to be entered, was a clear denial of intere
Court of Appeals under the discretion vested in
tion 1912.

III.

**Any conflict between certain of the Courts of A
to proper construction of a mandate silent as
was resolved by the decision of this Court in
Pennsylvania R. Co.**

Petitioner, to show a conflict among certain
Appeals regarding the proper construction of
silent as to interest, cites several cases including
& Arkansas Ry. Co. v. *Pratt,* 142 F. 2d 847 (5th
and *Briggs* v. *Pennsylvania R. Co.,* 164 F. 2d
1947) *affirmed,* 334 U. S. 304 (Petition, p. 4).

The same conflict was the reason for the g
tiorari by this Court in the *Briggs* case, and
was resolved by the decision in that case wher

held, after full consideration of the authorities, that a District Court may not award interest where the reviewing court makes no provision for interest in its mandate but instead directs the entry of judgment in a specified amount. The authorities relied upon by this Court in the *Briggs* decision included *Boyce's Executors* v. *Grundy,* 9 Pet. 275, and *In re Washington & Georgtown R. Co.,* 140 U. S. 91, cited above. The Court said of the rule in those cases:

> "We do not see how it can be questioned at this time. It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by amendment of the mandate." (334 U. S. at 306.)

It should be noted, in connection with the above statement,

(1) that in the instant case, as in the *Briggs* case, the petitioner made no effort to have the Court of Appeals amend its mandate, and

(2) that in the *Briggs* case, as in the instant case, the claim for interest was advanced under Section 1961, rather than Section 1912, but the Court held that it did not even reach the question of whether Section 1961 might be applicable.

Thus, the petitioner here not only is claiming interest under an inapplicable statute, but it is also barred, by its failure to ask that the mandate be amended, from urging now either the claimed applicability or the claimed mandatory nature of Section 1961.

CONCLUSION.

For the reasons given above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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